IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BONNIE H., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and NYKOLE G., Appellees.	2 CA-JV 2005-0078 2 CA-JV 2005-0082 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
WILLIE G., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and NYKOLE G., Appellees.	

APPEALS FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 12152400

Honorable Javier Chon-Lopez, Judge Pro Tempore

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 In these consolidated appeals, Willie G. and Bonnie H. challenge the juvenile court's order of October 20, 2005, terminating their parental rights to their daughter, Nykole G., following a jury trial. We affirm.

Factual and Procedural Background

¶2 Viewed in the light most favorable to upholding the verdicts, *see Lashonda M. v. Arizona Department of Economic Security*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005), the evidence established that Nykole was born on June 5, 2001. When Child Protective Services (CPS) took her into custody in April 2004, her two older half-siblings, Bridget and Anthony, were wards of the state as dependent children.[1] In March 2004, the juvenile court had expressly denied Bonnie's request to leave the state with Bridget and Anthony and move to Kentucky. Nonetheless, in April, CPS received information that the family was in a motel in Texas and arranged for authorities there to pick up Bridget and

[1]Willie is Nykole's father but not the father of Bridget or Anthony.

Anthony. When a Texas CPS caseworker and a sheriff's deputy went to the motel for that purpose, the deputy smelled the odor of marijuana coming from the family's motel room. The caseworker took Bridget and Anthony into custody, and the deputy arrested Willie for possession of marijuana.

¶3 Upon learning that Willie had been arrested in Texas on a marijuana charge, that Bonnie was in a shelter in Texas because she had no money and no place to stay, and that Bonnie and Willie had been smoking marijuana in the children's presence, the Arizona Department of Economic Security promptly filed a dependency petition as to Nykole and obtained an order authorizing it to take her into protective custody. Nykole was subsequently removed from Bonnie's custody in Texas, and Arizona CPS workers brought all three children back to Tucson.

¶4 Instead of returning to Tucson, Bonnie and Willie eventually proceeded from Texas to Kentucky. The juvenile court subsequently denied their request to appear telephonically at Nykole's contested dependency hearing in Tucson in July 2004, and neither parent attended in person. Nykole was adjudicated dependent as to both Bonnie and Willie on July 14.[2] We affirmed the adjudication on appeal and found no abuse of the juvenile court's discretion in refusing to allow the parents to appear at the dependency

[2]Six weeks earlier, the Department had filed a motion pursuant to A.R.S. § 8-533(B)(8)(b) to terminate Bonnie's parental rights to Bridget and Anthony. The juvenile court granted the motion, severing Bonnie's rights to both children in December 2004; we affirmed the termination order on appeal. *Bonnie H. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2004-0093 (memorandum decision filed July 29, 2005).

hearing telephonically. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 17, 119 P.3d 1034, 1037-38 (App. 2005).

¶5 Sometime before March 30, 2005, Bonnie and Willie moved back to Arizona, which their CPS case manager learned when they appeared in court on March 30 for a combined permanency hearing as to Nykole and dependency review hearing as to Bridget and Anthony. The juvenile court continued the permanency hearing until early May, both parents appeared in person at that hearing, and the juvenile court directed the Department to file a motion to terminate both parents' rights. Both Bonnie and Willie requested a jury trial.

¶6 After a four-day trial in September 2005, the jury found the Department had proven by clear and convincing evidence that Bonnie and Willie had abandoned Nykole and by a preponderance of the evidence that terminating their parental rights was in Nykole's best interests. As to Bonnie, the jury further found severance justified under A.R.S. § 8-533(B)(10) because Bonnie had "had her parental rights to another child terminated within the preceding two years for the same cause and . . . [wa]s currently unable to discharge her parental responsibilities due to the same cause."

Legal Issues and Discussion

¶7 Willie contends there was no substantial evidence to support the jury's finding that he had abandoned Nykole because, he claims, he had "made repeated, consistent and specific requests for contact with Nykole." He further claims the Department's refusal to

allow him visitation with Nykole was improper because it was not based on "an evidentiary finding" that contact with him would be detrimental to Nykole. As a result, he contends, the Department's denial of visitation constituted just cause, within the meaning of A.R.S. § 8-531(1), for his lack of contact with Nykole. Similarly, Bonnie argues that, "because the parents were denied contact with their child," there was no clear and convincing evidence they had abandoned her.

¶8 In reviewing a juvenile court's order terminating parental rights based on a jury's verdict, we view the evidence in the light most favorable to upholding the verdict. *Lashonda M.*, 210 Ariz. 77, ¶ 13, 107 P.3d at 927. We do not reweigh the evidence but look only to determine whether substantial evidence sustains the verdict. *Id*. "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999).

¶9 Abandonment, as a ground for termination of parental rights under § 8-533(B)(1), is defined in § 8-531(1) as follows:

> "Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

By continuing their move to Kentucky after Nykole and her siblings had been returned to Arizona and by remaining out of state and refusing to comply with the requirements of their

case plan for roughly eleven months, Bonnie and Willie abandoned Nykole within the definition of § 8-531(1).

¶10 As noted above, both parents maintain they should not be deemed to have abandoned Nykole when the Department refused them visitation with her. But, as the Department correctly observes, the denial of visitation does not preclude a finding of abandonment, particularly when the denial is attributable to a parent's intentional failure to participate in reunification services. *See In re Maricopa County Juvenile Action No. JS-501568*, 177 Ariz. 571, 578-79, 869 P.2d 1224, 1231-32 (App. 1994). At the preliminary protective hearing for Nykole in April 2004, the juvenile court ordered that the parents could "have telephonic contact [with her] if therapeutically approved." The therapist who worked with Nykole from May 2004 until August 2005 was never willing to recommend such contact, largely because the parents expressly refused to participate in the tasks required by their case plan. Without that effort at compliance on their part, the therapist viewed contact between Nykole and her parents as unfair and potentially harmful to Nykole.

¶11 From April 2004 until approximately March 2005, Bonnie and Willie were in Kentucky, voluntarily and without the court's permission, while their children were in foster care in Arizona. Throughout that year, and even after they returned to Arizona in March, the parents refused to participate in reunification services of any kind. Given a juvenile court's broad discretion to determine whether and under what conditions visitation is best for a child, *In re Maricopa County Juvenile Action No. JD-5312*, 178 Ariz. 372,

375, 873 P.2d 710, 713 (App. 1994), we find no abuse of discretion in the court's conditioning visitation in this case on a therapist's approval, to insure the visits would not be detrimental to Nykole.

¶12 Compounding their eleven-month absence from Arizona while Nykole was here, the parents' refusal to undertake—in Arizona or Kentucky—any of the required rehabilitative services that might have helped them obtain therapeutic approval for visitation with Nykole constituted additional relevant evidence on the issue of abandonment. *See Maricopa County No. JS-501568*, 177 Ariz. at 578, 869 P.2d at 1231. Telephonic contact with the caseworker, without also undertaking the case plan tasks, constituted "only minimal efforts" to maintain the relationship. § 8-531(1). Thus, the Department presented substantial evidence to support the jury's finding that Bonnie and Willie had abandoned Nykole for purposes of §§ 8-531(1) and 8-533(B)(1).

¶13 Willie relies heavily but mistakenly on *Michael M. v. Arizona Department of Economic Security*, 202 Ariz. 198, 42 P.3d 1163 (App. 2002), as controlling authority. In *Michael M.*, we held it improper to deny a father's requests for visitation with his infant daughter based only on the father's incarceration, absent any showing of potential harm to the child from visiting him at the jail. *Id.* at ¶ 13. Here, in contrast, Willie was not incarcerated but had left Arizona voluntarily, had remained away for almost a year, and had persistently refused to participate in any of the tasks required by his case plan. Unlike the

father in *Michael M.*, Willie was denied visitation because of his refusal to participate in rehabilitative services.

¶14 Willie also complains that the juvenile court's order denying visitation was based only on the possibility of future harm to Nykole rather than on current harm. But the court's order was actually based on the parents' ongoing refusal to comply with the requirements of their case plan and its finding that visitation under those circumstances was harmful to Nykole. We cannot conclude, as Willie argues, that the court was required to allow visits to occur first and then determine whether further visitation would be harmful.

¶15 Before trial, the juvenile court granted the Department's motion in limine to preclude any evidence at trial about events that preceded Nykole's removal from her parents' custody on April 13, 2004. Bonnie contends that the juvenile court's refusal to allow her to testify about "her accomplishments and her experiences" in the dependency proceeding involving Bridget and Anthony "denied her the ability to explain her actions" in this case. She apparently intended to argue at trial that the Department and the juvenile court were biased against her, which accounted, she suggests, for her refusal to perform her case plan tasks or to accept any rehabilitative services in Nykole's dependency proceeding and explained why she had hoped to "transfer the case to Kentucky."

¶16 On the issue of abandonment under § 8-533(B)(1), however, it is a parent's actions that matter, not the parent's reasons for those actions. "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct: the statute asks whether a

parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 18, 995 P.2d 682, 685-86 (2000).

¶17 Consequently, the evidence Bonnie wanted to introduce about events that had occurred during Bridget's and Anthony's four-year dependency proceeding was irrelevant to the issue of Bonnie's abandonment of Nykole, and the juvenile court did not abuse its discretion in refusing to allow such evidence. *See Lashonda M.*, 210 Ariz. 77, ¶ 19, 107 P.3d at 928-29 (juvenile court has broad discretion to admit or exclude evidence; appellate court will not interfere with ruling absent clear abuse of discretion and resulting prejudice). Once we have determined that a severance order may be affirmed on any single statutory ground, we need not consider issues that pertain to other statutory grounds alleged. *Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687. Thus, to whatever extent the evidence Bonnie hoped to introduce might have been relevant, as she claims, to her defense to the allegation under § 8-533(B)(10) as a ground for severance, we need not reach that issue because we have found termination was warranted based on abandonment under § 8-533(B)(1). *See Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687 (same).

¶18 Next, Bonnie contends the jury's verdicts were inconsistent because the jury found the Department had not proved that her rights to Nykole should be terminated pursuant to § 8-533(B)(8)(a) (nine-month, out-of-home placement) yet still found Bonnie

had "had her parental rights to another child terminated within the preceding two years for the same cause." *See* § 8-533(B)(10). Again, however, because we conclude the ground of abandonment was established, we need not address arguments that pertain to any other statutory grounds alleged. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 14, 83 P.3d 43, 49 (App. 2004) ("Because we find that sufficient evidence supports the first ground for termination, we need not consider the [other statutory] ground."); *Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687 (same).

¶19 Finally, Bonnie suggests she was "denied her fundamental rights to protect her parental rights to her child" when the existence of a statutory ground for severance and the issue of the child's best interest were tried in a single trial.[3] If Bonnie requested a bifurcated trial below, she has failed to state that fact on appeal or to cite the record where she did so. Our review, therefore, is for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005) (appellant who fails to object to error at trial must establish both that error was fundamental and that it resulted in prejudice); *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005) (applying fundamental error doctrine in appeal from order terminating parental rights).

[3]Bonnie's additional argument that the juvenile court lacked personal jurisdiction over Nykole has now been finally resolved against her. When she filed her opening brief, her petition for review of our decision affirming Nykole's dependency adjudication was still pending. The Arizona Supreme Court denied review on April 20, 2006.

¶20 Bonnie acknowledges the lack of any legal authority requiring that the existence of a statutory ground for severance be tried separately from the determination of the child's best interests. Her argument appears to be that the higher, clear-and-convincing standard of proof required for statutory grounds versus the lower, preponderance-of-the-evidence standard needed to prove best interests, *see Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005), and the potentially divergent interests of parent and child, *id.* ¶ 31, obligated the juvenile court to order a bifurcated trial sua sponte.

¶21 The Department responds that the juvenile court had no authority to order the issues tried separately, even had Bonnie requested bifurcation. The Rules of Procedure for the Juvenile Court, 17B A.R.S., include no provision comparable to Rule 42(b), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, which permits a court to order separate trials of any claims or issues in the interest of convenience, expedience, economy, or avoiding prejudice. *See generally* Ariz. R. P. Juv. Ct. 66. The legislature likewise seems to have contemplated a unified trial by providing in § 8-533(B) that, "in considering any of the following [statutory] grounds [for termination], the court shall also consider the best interests of the child."

¶22 Bonnie has not explained, nor can we readily envision, how trying the issues together in a single trial created prejudice, particularly when the jury was properly instructed on the differing standard of proof required for each. *See generally Kent K.*, 210 Ariz. 279, ¶ 32, 110 P.3d at 1020 ("Arizona does not explicitly bifurcate its termination proceedings into fact-finding and dispositional stages. . . . Although the court considers the separate

inquiries required under section 8-533.B in a single hearing, the two inquiries are comparable to the separate fact-finding and dispositional hearings conducted under the New York statute."). Absent either a request for bifurcation below or citation of any authority directly supporting Bonnie's contention, we find no error—fundamental or otherwise—in the juvenile court's allowing the jury to determine in the same trial the existence of statutory grounds for termination and Nykole's best interests.

Conclusion

¶23 Having found that none of the issues raised on appeal warrants reversal and that the evidence amply supports the jury's verdicts, we affirm the juvenile court's order terminating the parental rights of Bonnie H. and Willie G. to Nykole G.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge